

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 1284

EDNA F. STONESIFER and JOSEPH N. STONE-
SIFER, her husband,

Petitioners,

vs.

CARL J. SWANSTROM, LOUIS H. HAMMERSTROM,
individually, and as executor of the last will and testa-
ment of Lillian F. Swanson, deceased, GEORGE F.
ANDERSON, EDITH B. SLUTZ, DONALD P. SLUTZ,
RUTH BARRE, DENZIL BARRE, and CHICAGO
CITY BANK AND TRUST COMPANY, an Illinois
banking corporation,

Respondents.

**PETITION FOR ISSUANCE OF THE WRIT OF CER-
TIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND SUPPORTING
BRIEF.**

CHARLES R. AIKEN,
77 West Washington Street,
Chicago 2, Illinois.

Counsel for Petitioners.



SUBJECT INDEX.

	Page
PETITION.	
Preliminary Statement	1
Matter Involved	2
Jurisdictional Basis	4
Questions Presented	5
Reasons For Allowing The Writ	6
Prayer	10

BRIEF.	
Opinion	11
Jurisdiction	11
Statement of the Case	11
Errors Relied On	14
Argument	16

SUMMARY OF ARGUMENT.

A.

The court below held it was bound by the findings of the trial court in an equity appeal exactly contrary to decisions of courts of appeals for other circuits 16

B.

The court of appeals wrongly declined to apply the State law governing the burden of proof in conflict with a decision of the Supreme Court on the subject 18

C.

The court of appeals affirmed the decree after refusing to consider assignments of reversible error properly presented for review	23
---	----

Table of Cases

Aro Equipment Corp. v. Herring-Wissler Co., 84 F. 2d 619	7, 18
Burroughs v. Mefford, 387 Ill. 461	20
Cities Service Oil Co. v. Dunlap, 308 U. S. 208	8, 22
Coca Cola Bottling Co. v. Munn, 99 F. 2d 190	22
Erie Railroad Co. v. Tompkins, 304 U. S. 64	21
Florida Fruit Canners v. Walker, 90 F. 2d 753	20
Howard v. U. S., 125 F. 2d 986	22
Kosakowski v. Bagdon, 369 Ill. 252	19
Laursen v. Lowe, 46 F. 2d 303	7, 18
Le Blanc v. Atkins, 387 Ill. 360	20
Maryland Casualty Co. v. Jones, 279 U. S. 792	10, 28
National Labor Relations Board v. Mackay Radio Co., 304 U. S. 333	5
Stonesifer v. Swanson, 146 F. 2d 671	11
Tucker v. Traylor Co., 48 F. 2d 783	20
Vrooman v. Howbacker, 387 Ill. 428	20

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. _____

EDNA F. STONESIFER and JOSEPH N. STONE-
SIFER, her husband,

Petitioners,

vs.

CARL J. SWANSTROM, LOUIS H. HAMMERSTROM,
individually, and as executor of the last will and testa-
ment of Lillian F. Swanson, deceased, GEORGE F.
ANDERSON, EDITH B. SLUTZ, DONALD P. SLUTZ,
RUTH BARRE, DENZIL BARRE, and CHICAGO
CITY BANK AND TRUST COMPANY, an Illinois
banking corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

Your petitioners respectfully represent as follows:

Preliminary Statement.

By this petition the Supreme Court is called on to de-
cide: (1) whether a court of appeals in an equity pro-

ceeding may refuse to review the evidence and is bound by the findings of fact made by the trial court; (2) whether a court of appeals might decline to follow the local practice regulating the burden of proof in a case where State law is the controlling rule of decision; and, (3) whether a court of appeals can affirm a judgment without passing upon assignments of reversible error properly presented for review.

I.

Matter Involved.

Petitioners sued by virtue of diversity citizenship in the District Court for Northern Illinois to rescind an executory agreement. The contract stipulated that the conveyance of an apartment building and a cash gift to petitioners from their deceased mother be abrogated and directed distribution of her estate contrary to the terms of her will. The property settlement was procured by petitioners' stepfather through the executor of their mother's will and his attorney, the respondents here, for the benefit of such fiduciaries.

By their complaint, petitioners asked in separate counts for a cancellation of the contract because of fraud practiced by the fiduciaries and on the ground there was a total failure of consideration. The fiduciaries answered denying the charges, and the cause was referred to a master in chancery for hearing.

State law is the controlling rule of decision in this case, and in Illinois a contract between fiduciaries is presumptively fraudulent. The Illinois decisions lay down the rule that when a transaction between fiduciaries is attacked the burden of proof devolves upon the defending beneficiary

to establish by clear and convincing evidence that the bargain is free from fraud and was entered into with full knowledge by the complainant, after independent advice, and upon adequate consideration.

The master refused to follow the State law and held according to the Federal rule that the burden of proof was upon him who brought the suit to show fraud affirmatively. By his report the master found "that the allegations set forth in the bill of complaint are not supported by adequate proof" (R. 1036), and recommended "that the bill of complaint should be dismissed for failure of material allegations contained therein" (R. 1038).

During the course of the trial, the master excluded documentary evidence and testimony, bearing vitally on the issues of fraud and consideration, offered by the plaintiffs erroneously charged with the burden of proof. After his rejection of plaintiffs' proof, the master found that there was "not sufficient evidence" to support charges made in the complaint (R. 1037).

The chancellor upheld the master, finding by his decree merely "that the material allegations contained in said complaint have not been proved and are not sustained by the evidence" (R. 1058), and dismissed the complaint for want of equity (R. 1062).

Petitioners prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit assigning as reversible error the master's refusal to follow the Illinois rule that the burden of proof was upon the fiduciaries, not upon petitioners, and challenging the propriety of the trial court's finding that there was insufficient evidence to sustain the charges of fraud made in the complaint. Also

urged as ground for reversal of the decree was the master's exclusion of plaintiff's offered proof.

The court of appeals affirmed the decree, but in its opinion stated: "As to Swanson, the stepfather . . . we think a finding in favor of the plaintiffs as to him would have been supported by the evidence." The court held, however, that its function was not to review the evidence and that it was bound by the findings of the trial court. The court said its "respect" for "the trier of facts" made it "impossible" for the court "to disturb the findings".

The court of appeals in its discussion of the case points out that the circumstances "strongly support" the plaintiff's claims, but then observes that it is not "satisfied" that it would be "warranted" in disturbing the trial court's findings, thus effectively upholding the view of the master and the chancellor that the burden of proof was upon the plaintiffs instead of the defendants.

The court of appeals refused to notice the contentions advanced by the appellants relative to the exclusion of evidence and completely ignored their claims as to a total failure of consideration.

II.

Jurisdictional Basis.

A.

Issuance of the writ of certiorari upon this record is authorized by section 240 of the Judicial Code (28 U. S. C., sec. 347a).

The judgment sought to have reviewed was rendered by the Circuit Court of Appeals for the Seventh Circuit af-

firming a decree entered by the District Court for Northern Illinois dismissing petitioners' complaint for equitable relief. Section 240 of the Judicial Code provides in pertinent respects: "In any case, civil or criminal, in a circuit court of appeals, . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari, . . . that the cause be certified to the Supreme Court for determination by it . . ."

B.

The judgment presented for review was rendered by the court of appeals on January 4, 1945 (R. 1105). The reviewing court below denied a timely petition for rehearing on February 19, 1945 (R. 1147). This petition with supporting brief and record having been filed with the Clerk within three months after February 19, 1945, the application is made in time. (*National Labor Relations Board v. Mackay Radio Co.*, 304 U. S. 333.)

III.

Questions Presented.

A.

Did the court of appeals properly refuse to review the facts in an equitable proceeding, and was the appellate court correct in considering itself bound by the trial court's findings of fact?

B.

Did the court of appeals wrongly decline to follow the rule of the Illinois courts designating which party bears the burden of proof in a proceeding to set aside a transaction between fiduciaries for fraud?

The Illinois decisions hold that the burden of proof is upon the defendant to establish an absence of fraud by clear and convincing evidence. The reviewing Court below followed the federal rule that the party asserting the affirmative of an issue has the burden of proving it, and the onus was placed upon plaintiffs to establish that the defendants were guilty of the fraud charged in their complaint.

Subdivisions of this inquiry are:

(1) Is burden of proof a matter of substance, or is it a procedural question?

(2) Even if it be merely a procedural right does the federal view as to burden of proof apply where State law is the controlling rule of decision?

C.

Did the court of appeals satisfy the fundamental requirements of a judicial review in affirming the judgment without examining and considering assignments of reversible error properly preserved and presented for determination.

IV.

Reasons for Allowing the Writ.

The following special and important reasons for granting a review and for the exercise of the Court's discretionary consideration are presented upon this record.

A.

The ruling of the court of appeals in this case is in conflict with the decision of another circuit on the same matter.

In the case at bar, a suit in equity, the reviewing court below held:

"As to Swanson, the stepfather . . . we think a finding in favor of the plaintiffs as to him would have been supported by the evidence."

Yet, the court of appeals refused to reverse the decree dismissing plaintiffs' complaint. The court explained its action on the ground it could not review the evidence but was bound by the trial court's findings of fact. It said:

"This is not a trial *de novo*. The respect which we entertain for findings made by the trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made."

Upon this subject, the Circuit Court of Appeals for the Eighth Circuit held in *Aro Equipment Corp. v. Herring-Wissler Co.*, 84 F. 2d 619, as follows (p. 621):

"An appeal in equity brings before the appellate court the whole record, and the court is required to examine the record and try the case *de novo*. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court even though supported by substantial evidence."

Earlier, the Sixth Circuit had passed upon this matter in the following way (*Laurson v. Lowe*, 46 F. 2d 303, 304):

"In an equity appeal the obligation is imposed upon this court of reviewing the record, weighing the evidence, and determining as best we may whether the plaintiff has sustained the burden of proof resting upon him."

B.

The circuit court of appeals in the instant case has decided a federal question in a way that conflicts with an applicable decision of this Court.

The master found that the plaintiffs had not sustained the fraud charged in their complaint by adequate proof. The chancellor found that the allegations of the complaint had not been sufficiently proved. These rulings were challenged in the court of appeals as placing the burden of proof upon the plaintiffs whereas the Illinois rule cast the burden of proof upon the defendants. The reviewing court found that the evidence supported the charges made in plaintiffs' complaint, but held:

"We are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court."

Thus the court of appeals sanctioned the view of the master and chancellor that the Illinois rule did not apply and that the federal practice of requiring the party who asserted the affirmative of an issue to prove it governs, and placed the onus of establishing fraud upon the plaintiffs.

This Court in *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, was asked to determine whether a circuit court of appeals had properly applied the federal law instead of the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claimed legal title as a bona fide purchaser. Contrary to the ruling by the court below in this case, it was held in the *Dunlap* case that the Texas law raising a presumption as to the validity of the recorded legal title was a substantial right rather than a mere matter of practice in courts of equity, and that the State rule of evidence was controlling.

C.

In deciding the case at bar, the circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

To discharge the burden of proof cast upon them by the master at the trial, the plaintiffs offered in evidence a letter written by their deceased mother relative to the gifts she had made of her property. This document was found by the stepfather's lawyer when he opened the decedent's safe deposit box and was used by the attorney in advising the deceased's daughters as to their rights. The master rejected this proof and the chancellor overruled exceptions to the ruling. Exclusion of this probative instrument was assigned as reversible error and argued in the circuit court of appeals, especially in view of the master's adverse findings being limited to "the facts and circumstances submitted as evidence" (R. 1037).

In like manner testimony fully establishing the validity of decedent's cash gift to petitioners was offered and rejected, and assigned as error on appeal.

Neither of the contentions urged as to the impropriety of the trial court's refusal to admit this evidence was even noticed by the court of appeals in its determination of the cause. Also, the appellate court below completely ignored appellants' contention that there was a total failure of consideration to support the contract. It was stated in the opinion that there was only one ground urged for a reversal.

Thus, in effect, the reviewing court refused to reverse a wrong judgment under the admitted evidence and affirmed

the decree while declining to consider assignments of reversible error properly presented for decision.

The Supreme Court in *Maryland Casualty Co. v. Jones*, 279 U. S. 792, 795, reversed a judgment upon the sole ground that it was affirmed by the court of appeals "without referring to or considering the assignments of error relating to the rulings of the court in the progress of the trial".

This failure by the court of appeals to pass upon important questions presented upon a sufficient record constitutes a substantial deprivation of the petitioners' statutory right of review and ought not be approved. Such departure from the customary practice in the appellate function amounts to an impairment of the federal judicial process which should prompt the exercise of this Court's supervisory power.

Prayer.

Wherefore, petitioners pray that a review of the decision by the circuit court of appeals in this cause, and of its rulings and its refusal to rule as hereinbefore pointed out, may be granted, and that the writ of certiorari may issue in this behalf.

Respectfully submitted,

CHARLES R. AIKEN,
Counsel for Petitioners.

